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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. PRICE RAY BURNS, Defendant and Appellant.	G055126 (Super. Ct. No. 16HF0818) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Kristine A. Gutierrez, and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant challenges his conviction for indecent exposure on the basis there is insufficient evidence he willfully intended to direct public attention to his genitals. He also contends the trial court erred in failing to instruct the jury on the lesser offense of lewd conduct, and the prosecutor committed prejudicial misconduct in closing argument. Finding no grounds to reverse, we affirm the judgment.

FACTS

One summer day in 2016, Thomas Jager and his boys, ages nine and twelve, were at a 7-Eleven near the beach. As they were leaving the store, the younger boy proclaimed, "Hey, dad, I can see that guy's balls." When Jager looked over, he saw appellant standing about 10 feet away. His shorts were down to his mid-thigh, plainly exposing his genitals. Jager whisked his children across the street to their condominium before coming back outside to talk to appellant.

Based on his disheveled appearance, Jager assumed appellant was homeless. He asked appellant if he needed any help, and when no answer was forthcoming, he advised him to pull up his shorts and leave the area. Appellant hiked up his shorts, which were fastened around his waist with a rope, and began walking toward the 7-Eleven. However, he continued to linger in the area. Watching from the balcony of his condominium, Jager noticed that whenever women and/or children walked past appellant, he would start following them. And as he got closer to them, his shorts would invariably start coming down.

Eventually, appellant made his way to the back of Mark Wulfemeyer's condominium, where several children were present. When a neighbor alerted Wulfemeyer to the situation, he contacted appellant, who was sitting on some steps with his buttocks exposed. Wulfemeyer directed appellant to get off his property, but appellant was nonplussed; he just muttered incoherently until Jager came down and ushered him out to the street.

That wasn't the end of the story, however. A few minutes later, Jager saw appellant sitting on a chair in front of Wulfemeyer's condominium. His shorts were down to his knees and he was cupping his penis with his hand. Once again, he was asked to leave the area, and when he failed to do so, Jager escorted him to the street and moved him along toward the 7-Eleven. Along the way, appellant fell a couple times and acted confused. However, no one saw him drinking alcohol or using any drugs that day, and when Jager took a picture of him on his phone, he knew enough about what was going on to pull up his shorts and say he did not want his picture taken.

At one point, Jager told appellant, "We don't believe you're drunk. . . . Get out of here. We're calling the police." A short time later, officers arrived to find appellant lying in the 7-Eleven parking lot with an open can of beer by his side. His shorts were halfway down his legs, and he complained of chest pain, but he was medically cleared by paramedics and taken into custody.

Appellant was charged with indecent exposure with a prior. (Pen. Code, § 314, subd. (1).)[1] He was also alleged to have served two prior prison terms. (§ 667.5, subd. (b).) At trial, defense counsel contended appellant was not guilty because, even though his private parts were exposed to others on the day in question, he was largely oblivious to what was going on and harbored no lewd intent. To prove otherwise, the prosecution presented evidence that in 2012 appellant exposed himself to a college student in an elevator and asked her to scratch his penis. And the following year, he exposed himself to a mother and her children at a store. In the end, the jury convicted appellant as charged, and the trial court found the prior prison term allegations true. The court sentenced appellant to three years in prison for his actions.

[1] All further statutory references are to the Penal Code.

DISCUSSION

Sufficiency of the Evidence

Appellant contends there is insufficient evidence to support his conviction for indecent exposure. We disagree.

The standard of review for assessing the sufficiency of the evidence to support a criminal conviction is "highly deferential." (*People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 538.) Our task is to review the record in the light most favorable to the judgment to determine whether it discloses substantial evidence of the defendant's guilt. (*People v. Alexander* (2010) 49 Cal.4th 846, 917.) In so doing, "[w]e presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*Ibid*.) "'The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence . . . . [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.]'" (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 200.)

Appellant was convicted of violating section 314, subdivision (1), which makes it a crime to "willfully and lewdly" expose one's private parts in public. For purposes of this statute, "the word 'willfully' 'implies simply a purpose or willingness to commit the act' [citation]." (*In re Smith* (1972) 7 Cal.3d 362, 364.) The word "lewdly" connotes conduct that is sexually motivated. "Accordingly, a conviction [for indecent exposure] requires proof beyond a reasonable doubt that the actor not only meant to expose himself, but intended by his conduct to direct public attention to his genitals for purposes of sexual arousal, gratification, or affront." (*Id*. at p. 366.)

Appellant asserts there is insufficient evidence he willfully intended to direct public attention to his private parts. In fact, he contends that rather than trying to expose himself and draw awareness to his private parts, he was actually trying to cover them up by cupping his hand around his penis and pulling up his shorts at various times.

However, the repetitive nature of appellant's conduct strongly suggests he was trying to get people to look at his private parts for the purpose of sexual gratification or affront. Following the initial incident involving Jager's children at the 7-Eleven, Jager told appellant to leave the area, which was crowded with beachgoers. But appellant lingered in the area, and virtually every time women and/or children passed him by, he would follow them and his shorts would start to sag. He also purposely made his way over to Wulfemeyer's condominium several times, where numerous children were present. There, appellant did cup his hand around his penis at one point, but whether this ambiguous act was done for concealment or emphasis was a matter for the jury. And although appellant stumbled and appeared confused at times, he was quite lucid when Jager took his picture and when he was contacted by the police. It does not appear his actions were unintentional or that he was unaware they were offensive to others.

In assessing appellant's conduct, it is also telling that this wasn't the first time he has engaged in this sort of behavior. The prosecution presented evidence appellant indecently exposed himself on two prior occasions. Appellant contends that evidence doesn't mean much because, unlike the present case, he spoke to his victims and specifically drew attention to his genitals during those prior incidents. However, as he did during those prior incidents, in this case appellant exposed himself to women and children in a public location. The prior incidents were sufficiently similar to the charged offense so as to permit the jury to infer from them that appellant willfully and lewdly exposed his genitals in this case. As the court explained in *People v. Ewoldt* (1994) 7 Cal.4th 380, 402, to be probative on intent, the defendant's prior bad acts need not be distinctly similar to the charged offense; they need only be sufficiently alike to support the inference he probably harbored the same intent on each occasion, so as to negate a claim of accident, inadvertence or other innocent mental state.

Considering the evidence as a whole, and in favor of the judgment below – as we are required to do – we are convinced there is substantial evidence appellant

willfully exposed his private parts to others for the purpose of drawing public attention to them. We therefore reject his challenge to the sufficiency of the evidence. (Compare *In re Smith, supra,* 7 Cal.3d 362 [overturning the defendant's conviction for indecent exposure where the evidence revealed he was merely sunbathing naked at an isolated beach].)

Lesser Offense of Lewd Conduct

Appellant contends the trial court erred in failing to instruct the jury on the crime of lewd conduct. Although appellant did not request instructions on this offense at trial, he contends the court had a sua sponte duty to give them because lewd conduct is a lesser included offense of indecent exposure. Again, we must disagree.

"California law has long provided that even absent a request . . . a trial court must instruct a criminal jury on any lesser offense 'necessarily included' in the charged offense, if there is substantial evidence that only the lesser crime was committed." (*People v. Birks* (1998) 19 Cal.4th 108, 112.) "[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*Id*. at p. 117.)

As we have explained, appellant was convicted of indecent exposure, which requires the willful exposure of one's private parts with the intent to draw public attention to them. (§ 314, subd. (1); *In re Smith, supra,* 7 Cal.3d at p. 364.) In a similar vein, a person is guilty of lewd conduct, a form of disorderly conduct, when he "engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view." (§ 647, subd. (a).) However, while both offenses involve lewd behavior, our Supreme Court has interpreted the offense of lewd conduct to require "the *touching* of the genitals, buttocks, or female breast for the purpose of sexual arousal, gratification, annoyance, or offense[.]" (*Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 (*Pryor*),

italics added.) Since no touching is required for indecent exposure, and none was alleged in this case, lewd conduct was not a lesser included offense, and the trial court was not required to instruct on it. (*People v. Meeker* (1989) 208 Cal.App.3d 358, 362.)

In arguing otherwise, appellant draws our attention to two cases that reached a contrary result, *People v. Curry* (1977) 76 Cal.App.3d 181, 187 and *People v. Swearington* (1977) 71 Cal.App.3d 935, 944. But these cases "are not persuasive authority because they were decided before the Supreme Court defined the elements of lewd conduct in *Pryor*, *supra*. This definition makes it clear that lewd conduct is not a necessarily included offense of indecent exposure." (*People v. Meeker*, *supra*, 208 Cal.App.3d at p. 362.)[2]

Nevertheless, appellant contends instructions on lewd conduct were required under the lesser included offense doctrine because the evidence showed he touched his genitals in the process of exposing them to others. However, in applying the lesser included offense doctrine, we do not consider the evidence adduced at trial (*People v. Ortega* (1998) 19 Cal.4th 686, 698) – only the statute and the charging document. Therefore, this claim also fails.

Alternatively, appellant contends his attorney was ineffective for failing to "request an instruction on lewd conduct as a lesser included offense to indecent exposure." But, as we have explained, lewd conduct is not a lesser included offense of indecent exposure. And even if it were, the evidence strongly implicated appellant in the charged offense of indecent exposure. Because there was not substantial evidence from which a jury could conclude appellant was guilty only of lewd conduct, defense counsel was not remiss for failing to request instructions on that offense. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1184-1185.)

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[2] Appellant urges us to construe the indecent exposure statute to require a lewd touching, so it is consistent with the lewd conduct statute, as interpreted by *Pryor*. However, that would obliterate the difference between the two crimes and ignore the fact the lewd conduct statute fills a "gap in the penal law" that the crime of indecent exposure does not cover. (*Pryor, supra*, 25 Cal.3d at p. 256.)

Alleged Prosecutorial Misconduct

Lastly, appellant contends the prosecutor committed prejudicial misconduct in closing argument by referring to facts that were not in evidence. Once again, we are unconvinced.

On direct examination, the prosecutor questioned Jager extensively about his observations of appellant on the day in question. Jager not only testified that he saw appellant walking around his neighborhood with his private parts exposed, he expressed his opinion appellant was not drunk, he was only pretending to be under the influence, and his actions were intentional. The trial court granted defense counsel's request to strike these opinions on the basis they were speculative. However, in support of his contention appellant's conduct was willfully lewd, the prosecutor alluded to this stricken testimony in his closing argument.

The prosecutor repeated this mistake in discussing the testimony of responding officer Christopher Phelan, who told the jury appellant was laughing and joking with the paramedics when they were evaluating him in the parking lot of the 7-Eleven. Although the trial court struck that testimony as nonresponsive, the prosecutor referred to it in closing argument in asserting that appellant was coherent and aware that his actions were offensive to others.

The prosecutor's references to stricken testimony were obviously improper. (See *People v. Hill* (1998) 17 Cal.4th 800, 823-829 [during closing argument counsel may not mischaracterize evidence or reference facts that are not in evidence].) But appellant did not object to them, so he has forfeited his right to challenge them on appeal. (*People v. Friend* (2009) 47 Cal.4th 1, 29.)

Anticipating this result, appellant contends his attorney was ineffective for failing to object to the prosecutor's references to stricken testimony in closing argument. However, irrespective of the stricken testimony mentioned above, there was other testimony that would have supported the prosecutor's arguments. To wit, Jager testified

he told appellant point blank during their encounter that he did not believe he was drunk. And Officer Phelan testified appellant appeared to be coherent when he spoke to him in the parking lot of the 7-Elven store. Based on this testimony, the prosecutor had ample grounds to argue that Jager and Phelan's testimony supported the notion appellant's conduct was willful and lewd.

That being the case, it is not reasonably probable appellant would have obtained a more favorable result had his attorney objected to the challenged remarks. Therefore, his failure to do so did not violate appellant's Sixth Amendment rights. (See *Strickland v. Washington* (1984) 466 U.S. 668, 686–687 [to prevail on a claim of ineffective assistance of counsel the defendant must prove both deficient performance and resulting prejudice]; *People v. Williams* (1997) 16 Cal.4th 153, 215 [same].)

DISPOSITION

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.